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Sun West Bank

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Plaintiff,

v.

JACKIE K. DELANEY; LARRY E.
CARTER; MARK A. STOUT;
KENNETH TEMPLETON; JOHN

) Case No. 2:11-cv-00678-LRH-PAL

)
) **FEDERAL DEPOSIT**
) **INSURANCE CORPORATION**
) **AS RECEIVER FOR SUNWEST**
) **BANK'S OPPOSITION TO**
) **PROGRESSIVE CASUALTY**
) **INSURANCE COMPANY'S**
) **MOTION TO AMEND THE**
) **COMPLAINT**

1 SHIVELY; STEPHEN C. KALB;)
 2 JEROME F. SNYDER; HUGH)
 3 TEMPLETON; and RICK)
 4 DRESCHLER,)

Defendants.)

6 I. INTRODUCTION

7 Defendant Federal Deposit Insurance Corporation as receiver
 8 for SunWest Bank ("FDIC-R") opposes Progressive Casualty Insurance
 9 Company's ("Progressive") motion for leave to amend the complaint.
 10 Progressive seeks to amend the complaint in four ways. Three of the four
 11 amendments are purely factual updates: an amendment to indicate FDIC-
 12 R intervened in this action; an amendment to reflect FDIC-R has filed a
 13 lawsuit against the former directors and officers of the Bank ("D&Os"); and
 14 an amendment to reflect that Progressive has recently undertaken the
 15 defense of the D&Os, but reserves its rights to seek reimbursement of
 16 amounts paid. FDIC-R does not oppose these factual amendments.¹ On
 17 the other hand, FDIC-R opposes Progressive's motion relating to the fourth
 18 amendment that seeks to assert no "Claim" was asserted by FDIC-R against
 19 the D&Os. This new legal argument seeks to dramatically shift
 20 Progressive's legal position two and a half years after Progressive filed its
 21 complaint and more than three years after FDIC-R made its demand. The
 22 Court should reject such a shift in position this late in the litigation because
 23 the proposed amendment is futile, Progressive unduly delayed in asserting
 24 the proposed amendment, and the proposed amendment prejudices the
 25 defendants.

26
 27 ¹ FDIC-R reserves the right to contest various allegations related to these
 28 issues.

1 **II. FACTUAL BACKGROUND**

2 On October 20, 2011, FDIC-R made a demand by letter to the
3 D&Os. Progressive attached the letter to the original complaint as Exhibit
4 2. FDIC-R's letter states, in part, "this letter is a written demand for
5 payment of monetary civil damages" *Id.*

6 On April 29, 2011, Progressive filed this lawsuit against the
7 D&Os seeking a declaration that the "Claim" was untimely and that two
8 other policy defenses precluded coverage. On September 1, 2011,
9 Progressive moved for summary judgment. On or about November 1,
10 2011, the Court allowed FDIC-R to intervene. Order (#28). The Court
11 denied Progressive's motion for summary judgment and ordered the
12 parties to conduct discovery. Order (#44).²

13 For two and a half years, the litigation has focused on
14 Progressive's three defenses: whether the Claim was timely made, whether
15 the insured v. insured exclusion applies, and whether the unpaid loan
16 carveout to the definition of "Loss" precludes coverage. Consistent with
17 these three defenses, Progressive's summary judgment motion was
18 directed to these issues. Progressive only asserted the "Claim" was not
19 made during the policy period.³ Now, after more than two and a half years
20 of litigation, Progressive filed for leave to amend its complaint to, among
21 other things, assert no "Claim" was ever made.

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26 ² The case was stayed from October 18, 2012 to May 1, 2013.

27 ³ Progressive refused to advance defense costs to the D&Os until very
28 recently.

III. ARGUMENT

A. The Amendment to Contest Whether a "Claim" Was Made Is Futile.

The Progressive Policy ("Policy") requires a "Claim" be made during the policy period or discovery period to trigger coverage. A "Claim" is defined in the Policy, in part, as "a written or oral demand for monetary damages or non-monetary relief." There can be no question that FDIC-R's letter fits within the policy requirement of "a written or oral demand for monetary damages" as it states it is a "written demand for payment of monetary civil damages." Progressive routinely referred to FDIC-R's letter as a "Demand" both in the complaint and its motion for summary judgment. Compl. (#1), ¶ 1, 21-25; Pl's Mot. for Summ. J. (#20) at 6-7.

Progressive's proposed basis to amend the complaint to assert for the first time that no "Claim" was made, is that "[d]uring the course of this action, the FDIC has disclosed that at the time it issued the FDIC letter, it had not determined whether it would pursue a claim against the Directors and Officers." Pl's Mot. to Amend (#84) at 5.⁴ While FDIC-R disputes this assertion, the argument is legally irrelevant. Progressive's obligation under the Policy arises solely if a "Claim" is made, not whether or how any "Claim" might be pursued. Progressive offers no argument for

⁴ FDIC-R clearly stated its demand was subject to change. FDIC-R's October 20, 2010 demand states: "Because the FDIC's investigation is ongoing, the losses caused by the wrongful acts of the Directors and Officers, including those relating to the transactions identified above, are subject to change. The FDIC reserves all of its rights, including, but not limited to, the right to modify and supplement its demand for payment of civil damages against the Directors and Officers. At this time, however, the FDIC estimates losses in the amount of at least \$18 million, and demands payment of the same immediately." See Compl. (#1), Ex. 2 at 4.

1 why the definition of "Claim" has not been met. Therefore, the proposed
2 amendment to assert there is no "Claim" is futile. Courts deny proposed
3 amendments if they are futile. *See Leadsinger, Inc. v. BMG Music Publishing*,
4 512 F.3d 522, 532 (9th Cir. 2008); *Steckman v. Hart Brewing*, 143 F.3d 1293,
5 1298 (9th Cir. 1998) ("[a]lthough there is a general rule that parties are
6 allowed to amend their pleadings, it does not extend to cases in which any
7 amendment would be an exercise in futility"); *Pisciotta v. Teledyne Indus.*, 91
8 F.3d 1326, 1331 (9th Cir. 1996); *Gemini Ins. Co. v. Western Marine Ins. Servs.*
9 *Corp.*, No. 210-cv-03172, 2013 WL 4012740, at *5 (E.D. Cal. Aug. 6, 2013).
10 Accordingly, the portion of the proposed amendment relating to the
11 "Claim" issue should be denied.

12 **B. The Amendment Would Prejudice the Defendants.**

13 Progressive's proposed amendment is a change in position
14 from the position Progressive has been asserting for several years in
15 communications with the Defendants and in filings in this Court.
16 Specifically, as noted above, Progressive has asserted a "Claim" had been
17 made but disputed the "Claim" was timely. Now Progressive's position is
18 that no "Claim" has been made at all. This will change the discovery
19 needed in the case. Progressive apparently seeks to introduce the actions
20 of FDIC-R. This will lead to entirely new discovery not previously at issue
21 in the case. Therefore, Progressive's proposed change is prejudicial to the
22 Defendants as it will increase costs and force the Defendants to serve
23 additional discovery to address a defense that had never been asserted
24 before. *See Parker v. Joe Lujan Enterprises*, 848 F.2d 118, 121 (9th Cir. 1988)
25 (proposed amendment denied as it would force additional off-shore
26 discovery). In light of this prejudice, the motion to amend should be
27 denied.
28

1 **C. Progressive Has Unduly Delayed in Bringing the Motion to**
2 **Amend.**

3 One "relevant" factor in determining whether to grant leave to
4 amend is whether there has been undue delay in seeking leave to amend.
5 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).
6 In assessing undue delay, one consideration is whether the "moving party
7 knew or should have known the facts and theories raised by the
8 amendment in the original pleading." *Jackson v. Bank of Hawaii*, 902 F.2d
9 1385, 1388 (9th Cir. 1990). In this case, Progressive waited two and a half
10 years to assert its "there was no claim" defense in spite of the fact that it had
11 FDIC-R's demand since October 2010. If it had concerns about whether
12 FDIC-R's letter was a "Claim," it had plenty of time to raise this issue in
13 2010 and 2011. Courts deny leave to amend when the moving party delays
14 in asserting the proposed amendment. *Parker*, 848 F.2d at 121 (denying
15 leave to amend two and a half years after plaintiff had knowledge of
16 factual basis for proposed amendment); *Chaveriat v. Williams Pipeline Co.*, 11
17 F.3d 1420, 1428-29 (7th Cir. 1993) (denying motion for leave to amend after
18 two year delay). In this case, Progressive had FDIC-R's demand letter on
19 or about October 2010 and waited more than three years to raise this
20 argument. Progressive's undue delay in asserting its legal theory serves as
21 a basis to deny the portion of the proposed amendment that asserts this
22 new theory.
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1 IV. CONCLUSION

2 For these reasons, FDIC-R requests that the Court deny that
3 portion of the motion to leave to amend that seeks to change Progressive's
4 legal theory of the case and assert no "Claim" was made.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS LAW GROUP, and that the following documents were served via electronic service: **FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR SUNWEST BANK'S OPPOSITION TO PROGRESSIVE CASUALTY INSURANCE COMPANY'S MOTION TO AMEND THE COMPLAINT**

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DATED this 2nd day of January, 2014.

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